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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FIRST COMMUNITY BANK,

Plaintiff and Appellant, **A134168**

v. **(Contra Costa County Super. Ct. No. MSC09-02250)**

BANK OF THE WEST,

Defendant and Respondent.

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First Community Bank's (FCB) second amended complaint alleged a fraud claim against Bank of the West. The trial court sustained Bank of the West's demurrer without leave to amend, concluding FCB failed to allege facts showing it justifiably relied on Bank of the West's alleged misrepresentation or failure to disclose information. In reaching this conclusion, the court took judicial notice of several documents, including deposition testimony, a contract between the parties, property appraisals, and a credit authorization memorandum.

On appeal, FCB contends the court erred by: (1) taking judicial notice of and weighing extrinsic evidence proffered by Bank of the West; (2) concluding the second amended complaint did not state a cause of action for fraud; and (3) staying discovery pending Bank of the West's demurrer to the operative complaint.

We reverse. We assume for the sake of argument the court properly took judicial notice of the documents proffered by Bank of the West and the facts asserted within them

(and, where relevant, the legal effect of the documents). We conclude, however, that the judicially noticed documents do not negate the allegations of the operative complaint. Because the operative complaint stated a cause of action for fraud, the court erred by sustaining Bank of the West's demurrer without leave to amend. We therefore reverse the judgment in favor of Bank of the West.

FACTUAL AND PROCEDURAL BACKGROUND

We accept as true the following allegations in FCB's second amended complaint for the purpose of reviewing the order sustaining Bank of the West's demurrer:[1]

At some point before April 2004, Wells Fargo made a loan to Kobra Properties, G.P. (Kobra). In April 2004, Bank of the West purchased a $25,000,000 participation interest that loan. In 2005, Bank of the West loaned Kobra $14,287,000 to enable Kobra to purchase and develop 65.5 acres of property in Loomis.[2] The loan — which was secured by the property — was for a one-year period but could be extended for an additional two years under certain conditions. During the underwriting process, Bank of the West obtained an appraisal from PGP Appraisers (PGP) stating the "as is" value of the property was $21,980,000 (2005 appraisal).

Bank of the West sold a $9,287,000 participation interest in the loan to two banks and retained a 35 percent interest in the loan of $5,000,000. In August 2007, FCB purchased a 50 percent interest in the loan for $6,298,742.52 pursuant to a Sale and Participation Agreement (Participation Agreement).

Before the loan's initial maturity date, Kobra asked Bank of the West to extend the loan so it would have more time to develop the property. At Bank of the West's request, PGP performed a second appraisal (2006 appraisal). A second appraisal was necessary because the loan could not be extended unless the loan-to-value ratio remained at a

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[1] FCB's statement of facts violates California Rules of Court, rule 8.204(a)(1)(C) because it provides "virtually no pertinent citations to the record. Consequently, we do not accept [the] factual assertions" in FCB's opening brief. (*Stasz v. Schwab* (2004) 121 Cal.App.4th 420, 424 & fn. 1.)

[2] In August 2005, Kobra entered into a written purchase and sale agreement (Purchase Agreement) to purchase the property for $21,954,240.

certain level, which in turn required the property to "continue to be valued in the range of $21,980,000 as set forth in the 2005 [a]ppraisal." Bank of the West's internal appraiser, Edmond Nagel, reviewed a draft of the 2006 appraisal and learned PGP had concluded that the value of the property was $14,987,406 — not $21,980,000 — "in light of the true purchase price of $10,000,000." PGP had reached this conclusion because the property's purchase price could not be confirmed and had been "fraudulently reported." Nagel told Gary Miller, another Bank of the West employee, and Miller implored Nagel to "convince PGP to value the [p]roperty in the range of $21,980,000.00 as set forth in the 2005 [a]ppraisal so that the 'Loan-to-Value' ratio [remained proper] in order for the [ ] Loan to be extended." Miller also told Bank of the West employee Stacey Michrowski about the "drastically different conclusion reached by PGP" regarding the value of the property.

Nagel then "contacted PGP and convinced [it] to increase the appraised valuation of the Property from $14,987,406.00 to $22,500,000" to preserve the proper "Loan-to Value" ratio. The 2006 appraisal noted there was no purchase price for the property listed in county records, but that the document transfer tax for the property suggested it was purchased for $10,000,000. The appraisal also stated the value of the property was $14,987,406 "'rounded to'" 22,500,000. In response to a question raised by another participant in the loan, Nagel "asked PGP to revise the draft to state that the value of the Property was $22,495,383.00 'rounded to' $22,500,000,00." FCB and others were "led to believe that the different value[ ]" for the property in the revised 2006 appraisal was a typographical error that PGP had corrected.

Nagel performed an internal appraisal and prepared a memorandum of appraisal review. While he prepared the memorandum of appraisal review, Nagel received information from an "acquaintance who was an appraiser" that the seller of the property said it "was sold for less than the Purchase Price in the Purchase Agreement." As a result, Nagel "was made aware that the seller of the Property had implicitly disavowed the Purchase Agreement and repudiated the Purchase Price."

The memorandum of appraisal review noted the discrepancy between the purchase price and the price reflected in the transfer tax. Michrowski also knew of the discrepancy but failed to investigate because she "was concerned that the information would reveal that the Purchase Price was inaccurate and that the Purchase Agreement was not genuine which would require [Bank of the West] to declare a default on the . . . Loan and could potentially result in a significant loss" for Bank of the West.

In November 2006, Bank of the West extended the loan. In 2006, Kobra "was making payments late" and some time before August 2007, it informed Bank of the West that it "would be unable to make a required principal payment."[3] At that point, Bank of the West decided to refinance the loan and contacted FCB about participating. As stated above, in August 2007, FCB purchased a 50 percent interest in the loan for $6,298,742.52 pursuant to the Participation Agreement. After entering into the Participation Agreement, FCB learned the "true and actual purchase price paid by Kobra" to purchase the property "was $10,000,000.00" and that Bank of the West had manipulated the 2006 appraisal and overstated the property's valuation.

FCB believed it "could not directly contact Kobra or related third parties, including the appraisers of the Property" before deciding whether to enter into the Participation Agreement. Both FCB and Bank of the West "understood that [FCB] had to rely on the information provided by" Bank of the West concerning the loan. Before FCB purchased the interest in the loan, Bank of the West did not disclose it: (1) knew the "real value" of the property was $14,987,406 or less, not $22,500,000; (2) knew the seller of the property had "implicitly disavowed the Purchase Agreement and repudiated the Purchase Price[;]" (3) manipulated the 2006 appraisal; (4) failed to investigate to determine the property's "actual purchase price[;]" and (5) knew Kobra was having trouble repaying the loan and that the loan would have "experience[d] a default on principal and interest" if Bank of the West had not refinanced the loan in 2007.

Kobra did not repay the loan and Bank of the West did not return FCB's money.

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[3] The loan was about to experience a monetary default of principal and interest due, which would have triggered a default of the loan Wells Fargo made to Kobra.

The Original and First Amended Complaints

In an August 2009 complaint, FCB sued Bank of the West for rescission of the Participation Agreement.[4] FCB's theory was that both it and Bank of the West operated under a mutual mistake of fact about the purchase price of the property when Bank of the West made the loan.

After conducting extensive discovery, Bank of the West moved for summary judgment. The court's tentative ruling was to grant the motion, but on the day of the hearing on the motion, FCB moved to amend the complaint to replace the rescission claim with a fraud cause of action. FCB claimed it "recently obtained evidence" that Bank of the West "intentionally concealed material facts from FCB which fraudulently induced FCB to enter into the [Participation] [A]greement." Specifically, FCB claimed the deposition testimony of two Bank of the West employees — Nagel and Michrowski — demonstrated Bank of the West had "serious concerns" that Kobra had "defrauded" Bank of the West in its loan application and that Bank of the West "failed to disclose that information to FCB when negotiating" the Participation Agreement. Bank of the West opposed the motion to amend.

At the hearing on FCB's motion to amend the complaint, Bank of the West indicated it planned to demur to the first amended complaint and asked the court to stay discovery — specifically 12 depositions FCB had noticed — until the court ruled on the forthcoming demurrer. Bank of the West indicated it had already spent $700,000 defending a "mutual mistake claim" that was "being abandoned" and said it did not want to expend additional money on discovery. FCB objected, claiming Bank of the West had not demonstrated "there's going to be any undue prejudice . . . to conduct discovery that has been scheduled for a long time" and noted Bank of the West had not moved to stay in writing. The court took Bank of the West's motion for summary judgment "off

[4] Bank of the West filed, but later dismissed, a cross-complaint against FCB. Kobra is a defendant but is not a party on appeal and is mentioned only where relevant to the issues raised in FCB's appeal.

calendar[,]"granted FCB's motion to amend the complaint, and stayed discovery "until further order of the Court."

FCB filed a first amended complaint asserting a fraud claim against Bank of the West. FCB alleged Michrowski "engaged in acts of fraud and deceit" by concealing "the material facts" that Bank of the West had "serious doubt and concern regarding the actual purchase price of the Property . . . and the integrity of Kobra as a borrower." FCB further alleged Bank of the West "failed to disclose" that it intentionally declined to "follow up to resolve the discrepancy regarding the actual purchase price for the Property by contacting Kobra or the escrow company[.]" According to FCB, Bank of the West's statements and omissions were intentional and were intended to deceive FCB.

Bank of the West demurred, contending FCB could not state a claim for fraud because FCB "was provided with the 2006 and 2007 PGP appraisals that identify the discrepancy between the price paid based on the purchase contract and the transfer tax yet FCB proceeded with the purchase." At Bank of the West's request and over FCB's written objection, the court took judicial notice of the declaration of Kyle Fisher and the deposition of Robert Bishop submitted by FCB in opposition to Bank of the West's motion for summary judgment. According to Bank of the West, FCB's fraud claim failed because, among other things: (1) the "material fact" regarding the discrepancy between the transfer tax and the purchase price was "fully disclosed[;]" and (2) in the Participation Agreement, FCB agreed to make its own independent determination regarding whether to purchase the participation interest.

The court sustained the demurrer with leave to amend. It concluded FCB "had notice of the discrepancy between the purchase price and county records regarding the document transfer tax, and had no concerns about it. . . . [FCB] has not alleged facts showing why it did not have sufficient information to give rise to its own doubts and concerns, or how the additional information allegedly known to [Bank of the West] was substantially different from information it already had concerning the discrepancy." In addition, the court rejected FCB's allegations regarding Bank of the West's "failure to disclose facts which allegedly indicated that [Kobra] was not an acceptable credit risk

and was dishonest." Finally, the court determined FCB "presumably had notice of this based on its knowledge of the discrepancy in the purchase price. . . . [FCB] . . . alleges no facts to indicate why it was entitled to rely on the absence of disclosures by [Bank of the West] to assume that the borrower was an acceptable credit risk, and that it had no duty of its own to discern such matters."

The Second Amended Complaint and Bank of the West's Demurrer

The second amended complaint alleged a fraud claim against Bank of the West. Specifically, FCB alleged Michrowski concealed the material fact that before entering the Participation Agreement, Bank of the West "manipulated the 2006 Appraisal" to make the Property appear to have an acceptable 'Loan-to-Value' ratio to extend the 2005 Loan." FCB also alleged Michrowski failed to disclose that Bank of the West had "been made aware that the seller of the Property had implicitly disavowed the Purchase Agreement" and that Michrowski failed to inform FCB about its "serious doubt and concern about the actual purchase price and genuineness" of the Participation Agreement. According to FCB, the omissions and representations constituted "fraud and deceit" and were material because they "concealed the true state" of the loan between Kobra and [Bank of the West] "as well as the lack of integrity of Kobra as a borrower." FCB "was led to believe that the Purchase Price was accurate, that the Purchase Agreement was genuine and that Kobra was an acceptable credit risk based on its character. In reality, the . . . Loan and the collateral which had been pledged by Kobra to secure the . . . Loan was problematic and the borrower was dishonest. . . . [T]he omissions and representations were material because, among other things, they concealed the fact that serious doubt and concern existed within [Bank of the West] that Kobra had defrauded [Bank of the West] and was not an acceptable credit risk."

FCB further alleged the "statements, omissions, and acts" were false, that Bank of the West knew they were false, and that Bank of the West intended FCB to rely on them. FCB claimed it "would not have entered into the [Participation] Agreement if [it] had known beforehand that the Valuation was overstated, the Purchase Price was not accurate, the Purchase Agreement was not genuine and the 2006 Appraisal had been

manipulated" by Bank of the West. Finally, FCB claimed its reliance on Bank of the West was justified because Bank of the West appeared to be acting in good faith and because FCB "reasonably believed" Bank of the West "would disclose all material facts regarding the transactions as required by . . . Civil Code Sections 1572 and 1710." The second amended complaint sought compensatory damages of $6,298,742.52 and punitive damages.

Bank of the West again demurred. It argued FCB failed to allege "facts to show why it did not pursue its own investigation of the clearly disclosed discrepancy between the purchase price per the contract and the transfer tax." Bank of the West further argued the allegations in the operative complaint were "contradicted by FCB's own testimony, which clearly establishes FCB has no ability to state a claim for fraud."

As relevant here, Bank of the West filed requests for judicial notice of exhibits 1 and 2 pursuant to Evidence Code 452, subdivisions (b), (d), and (h).[5]

Exhibit 1

Exhibit 1 consists of excerpts of the deposition of former FCB employee Robert Bishop and three exhibits authenticated by Bishop during the deposition: (1) a 19-page Credit Authorization from for Loan Committee review on August 2, 2007 (Credit Authorization); (2) the Participation Agreement; and (3) a May 2007 appraisal prepared by PGP (2007 appraisal).

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[5] Unless otherwise noted, all further statutory references are to the Evidence Code. Section 452, subdivision (b) authorizes the court to take judicial notice of "[r]egulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States." Section 452, subdivision (d) permits judicial notice of "[r]ecords of . . . any court of this state or . . . any court of record of the United States or of any state of the United States" and section 452, subdivision (h) authorizes judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

Bank of the West urged the court to take judicial notice of seven exhibits spanning approximately 140 pages. Then, in connection with its reply brief, Bank of the West urged the court to judicially notice three additional exhibits, exhibits 8 through 10. Only exhibits 1, 2, and 9 are at issue on appeal.

Bishop testified the Participation Agreement contains his signature and an integration clause. Before deciding whether to participate in the loan and before signing the Participation Agreement, Bishop reviewed property appraisals that suggested a "different purchase price than the actual purchase price." Bishop received the 2005, 2006, and 2007 appraisals before FCB made a decision to participate in the loan. Bishop received "something like" the 2007 appraisal, reviewed it, and "incorporated parts of it into the Credit Authorization" that he prepared.

Before Bishop signed the Participation Agreement, he was aware of a "document transfer tax issue." He emailed Michrowski to try to "confirm a loan amount" when the property was purchased; she responded that "the loan amount . . . [in] 2005, was $14 million. . . ." Based on the Participation Agreement, the appraisal, and "those other things that we had, it seemed to [Bishop] that [FBC was] lending on a property that was valued based on the appraisal and purchase price per the purchase contract of [$]21, $22 million." Bishop also testified, however, that FCB's decision to participate in the loan was not made on Bank of the West's analysis but on FCB's own analysis of data provided to it.

Exhibit 1 also consists of the credit authorization, a 19-page document prepared by Bishop that analyzes whether FCB should participate in the loan. As relevant here, the credit authorization states Kobra purchased the property in 2005 for $21,954,000 and that the 2005, 2006, and 2007 appraisals list the value of the property as $21,980,000 and $22,500,000. The credit authorization also describes Kobra's financial condition.

The Participation Agreement is also part of exhibit 1. Paragraph 7.1, titled "Purchaser's Review," provides in relevant part: FCB "further acknowledges that it has become a party hereto in reliance upon its own independent investigation of [Kobra]'s financial condition and creditworthiness to the extent deemed necessary or advisable by [FCB] and not in reliance on any information, representation or advice provided by [Bank of the West]. [FCB] expressly acknowledges that [Bank of the West] has not made any representations or warranties to it and that no act by [Bank of the West] hereafter taken, including any review of the affairs of [Kobra], shall be deemed to constitute any

representation or warranty by [Bank of the West] to [FCB] other than a representation herein that [Bank of the West] is the current 100% beneficial owner of the Loan and is duly authorized to enter into this Agreement and sell to [FCB] the Participation Percentage of the Loan. . . . [FCB] further acknowledges that [FCB] will, independently and without reliance on [Bank of the West] and based on such documents and information as [FCB] deems appropriate at the time, continue to make its own credit decisions in connection with the Loan and this Agreement."

Paragraph 7.2, entitled "Seller's Responsibilities," provides in pertinent part, "[Bank of the West] shall not be liable to [FCB] . . . for any error of judgment of [Bank of the West] or for any action or failure to act by [Bank of the West] or for any losses suffered by [FCB] which are caused by actions taken or omitted at the direction or with the consent of [FCB] except for actual losses, if any, suffered by [FCB] hereunder which are proximately caused by [FCB']s own negligence or willful misconduct." Paragraph 7.4, titled "Limitations on Liability" states Bank of the West "[m]akes no warranty or representation . . . and shall not be responsible for any statement, warranty, or representation made in . . . connection with the Loan, the Collateral, the Loan Documents or for the financial condition or business affairs of Borrower. . . ."

Paragraph 10, titled "Investment Representation; Subparticipations" provides in relevant part, "[Bank of the West] has sold the Purchased Property to [FCB] pursuant to an exemption from registration under the Securities Act of 1933, as amended (the 'Act'), in reliance on representations of [FCB], which representations are confirmed by [FCB] by its execution of this Agreement, that [FCB] . . . (b) has been furnished copies of the relevant documents executed or to be executed in connection with the Loan and all financial information with respect to the transaction which it has requested, and has had access to such other information as it has deemed appropriate and requested . . . (c) is acquiring the Purchased Property solely on its own independent judgment and not upon any representations made by [Bank of the West]. . . ."

The final document in exhibit 1 is the May 2007 appraisal. As relevant here, the May 2007 appraisal states the property "was purchased on October 20, 2005. . . however,

no purchase price is provided in county records. There is a document transfer tax of $11,000, which is based on $1.10 per $1,000 of purchase price provided to the county recorder. This would indicate a purchase price of $10,000,000. . . ." The final page of the 2007 appraisal lists the "as is" value of the property as "$22,500,000."

Exhibit 2

Exhibit 2 is excerpts of Bishop's deposition testimony submitted in opposition to Bank of the West's motion for summary judgment. The excerpts are the same as those in exhibit 1, but exhibit 2 contains an additional excerpt of Bishop testifying that he reviewed the 2007 appraisal before signing the Participation Agreement, which concluded the property had a market value of $22,500,000 in May 2007. After reviewing the 2007 appraisal, Bishop emailed Michrowski for "confirmation as to the loan amount . . . when the loan was originally in 2005 made and the amount of that loan in connection with the purchase price." When Bishop signed the Participation Agreement, he did not have any "concerns" about the conclusions reached in the 2007 appraisal.

FCB's Opposition to the Demurrer and Bank of the West's Reply

FCB's opposition to the demurrer argued the allegations of the second amended complaint must be accepted as true. Citing *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593 (*Webb*), FCB argued the court could not transform a demurrer into a motion for summary judgment by taking judicial notice of documents purporting to contradict the allegations in the complaint. In addition, FCB emphasized the difference between the first and second amended complaints — the first amended complaint focused on Bank of the West's alleged concealment of its concerns about Kobra's integrity as a borrower, while the second amended complaint focused on Bank of the West's alleged manipulation of appraisals and "affirmative misrepresentations" to induce FCB to participate in the loan. FCB claimed it justifiably relied on the 2006 appraisal and the update. FCB did not file written objections to Bank of the West's request for judicial notice.

In reply, Bank of the West argued the second amended complaint failed to state a fraud claim because FCB could not have justifiably relied on the 2005 purchase price

when deciding to participate in the loan. According to Bank of the West, both banks were aware of the discrepancy between the transfer tax and the "Purchase Contract amount" and FCB was required by the Participation Agreement to independently investigate the transaction and not rely on information provided by Bank of the West. Bank of the West argued the 2006 appraisal "provides clear evidence of a 'typographical' error and unequivocally refutes FCB's claim for fraud."

In connection with its reply, Bank of the West urged the court to take judicial notice of three additional exhibits, including:

Exhibit 9

Exhibit 9 consists of "[r]elevant portions" of FCB's motion to file a first amended complaint and the supporting declaration of FCB attorney Stephanie Barber Hess.[6] Hess's declaration attached excerpts of Nagel's deposition and two exhibits from that deposition: the 2006 appraisal and Nagel's memorandum of appraisal review. The 2006 appraisal states the property was purchased "on October 20, 2005. . . . However, no purchase price is provided in county records. There is a document transfer tax of $11,000, which is based on $1.10 per $1,000 of purchase price provided to the county recorder. This would indicate a purchase price of $10,000,000 ($3.50/SF). [¶] Based on the indications of the comparables, the concluded value of the subject site is $7.88/SF. [¶] Therefore, the value of the subject property, which is 65.5 acres, is $14,987,406 ($7.88/SF x 2,854,744 SF), rounded to: [¶] **TWENTY TWO MILLION FIVE HUNDRED THOUSAND DOLLARS. [¶] $22,500,000**."[7]

The Hearing and Order on the Demurrer to the Second Amended Complaint

At the hearing on Bank of the West's demurrer to the operative complaint, counsel for FCB complained that "as a consequence" of the court's stay on discovery, "there's a

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[6] Bank of the West sought judicial notice of the documents in exhibit 1 and exhibit 9 in support of its demurrer to the first amended complaint. FCB objected and the court declined to take judicial notice of these exhibits.

[7] We do not summarize the other documents referenced in this request for judicial notice because Bank of the West claims it sought judicial notice only of the 2006 appraisal.

great deal of information that we can't put before you." Counsel also stated: "You've taken judicial notice of a number of documents, and by taking judicial notice . . . you've made factual determinations and value judgments concerning the truth and falsity of certain testimony and what the [FCB] should or should not have gleaned from an appraisal that was never even attached to the complaint and . . . shouldn't be before you. [¶] So the absence of discovery, plus the utilization of facts that have been presented in a previous summary judgment motion, has essentially turned this [demurrer] into a new summary judgment motion." Counsel described the court's tentative ruling as "replete with" inappropriate "factual findings[.]"

After hearing argument from counsel for Bank of the West, the court stated: "[t]he only thing that tweaked me . . . that I want to go and check to make sure I'm on solid ground is whether you're telling me that I'm taking judicial notice of things that I shouldn't, and I'll look at that. Because if I'm sound on that, then I'm sound on the ruling." In response, counsel for FCB said, "[a]nd I also would like you to look at the judicial notice issue[,]" "reiterate[d] the objections to the judicial notice[,]" and asked for leave to amend the complaint.

Following the hearing, the court issued an order sustaining the demurrer to the second amended complaint without leave to amend, concluding the operative complaint "still fail[ed] to allege facts showing justifiable reliance." The court explained: "[w]hile the first amended complaint was based on the discrepancy between the purchase price and the transfer tax, the fraud claim in the second amended complaint now focuses on the initial 2006 PGP appraisal that valued the property under $15 million because of the appraiser's inability to reconcile the contract price with the transfer tax. Thus, [FCB] appears to argue that it need not allege facts explaining why its own knowledge of the discrepancy between the purchase price and transfer tax shows it could not have justifiably relied on [Bank of the West]'s alleged failure to disclose its own doubts and concerns regarding that issue. . . .

"The court concludes these new allegations do not cure [FCB's] failure to allege facts showing that it justifiably relied upon [Bank of the West's] failures to disclose

information, or on the newly alleged misrepresentation that [Bank of the West] caused to be placed in the 2006 appraisal. Even though [FCB] now appears to allege reliance on the allegedly tainted 2007 appraisal, it is still the case that [FCB] knew about the purchase price discrepancy. [FCB] expressly alleges [ ] that PGP concluded the value of the property to be $14,987,406.00 in the 2006 appraisal. . . . Since the gist of [FCB']s allegations is that the property was not worth the amount stated in the appraisal, [FCB] is not relieved from its obligation to allege facts showing justifiable reliance on this appraisal in light of its knowledge concerning the discrepancy in the purchase price."

As relevant here, the court took judicial notice of exhibits 1 and 2 as requested in Bank of the West's moving papers and exhibit 9 as requested in Bank of the West's reply. The court, however, did not identify the Evidence Code provisions under which it took judicial notice. The court dismissed the second amended complaint and entered judgment for Bank of the West.

DISCUSSION

After taking judicial notice of various documents, the court concluded the second amended complaint's fraud cause of action failed to allege facts showing FCB justifiably relied on Bank of the West's acts or omissions. FCB contends the court erred by taking judicial notice of exhibits 1, 2, and 9 and by making improper inferences regarding the significance of those documents. FCB also contends the second amended complaint pleads facts sufficient to state a fraud claim and that the court erred by staying discovery pending the resolution of Bank of the West's demurrer.

I.

FCB Did Not Forfeit Its Judicial Notice Objections

Bank of the West contends FCB forfeited its objections to judicial notice by "not properly object[ing] below." According to Bank of the West, FCB's objection was untimely and insufficiently specific because FCB "did not object to the request for judicial notice in its opposition brief nor did it file a separate written objection."

An appellate court may not reverse a judgment unless "an objection to or a motion to exclude or to strike the evidence . . . was timely made and so stated as to make clear

the specific ground of the objection or motion." (§ 353, subd. (a); see also Simons, Cal. Evidence Manual (2013 ed.) § 1:20, p. 26 (Simons) ["to preserve an objection on appeal, a party must state it in a timely fashion, and it must be accompanied by a reasonably definite statement of the grounds"].)

In its opposition to the demurrer, FCB warned the court not to transform the demurrer into a summary judgment motion by taking judicial notice of documents purporting to contradict the allegations of the operative complaint. And at the hearing on Bank of the West's demurrer, counsel for FCB objected to the propriety of judicial notice. Counsel stated, "You've taken judicial notice of a number of documents, and by taking judicial notice . . . you've made factual determinations and value judgments concerning the truth and falsity of certain testimony and what the [FCB] should or should not have gleaned from an appraisal that was never even attached to the complaint and . . . shouldn't be before you." Counsel claimed the court was turning the demurrer into a motion for summary judgment by considering "facts that have been presented in a previous summary judgment motion. . . ." Counsel also characterized the court's tentative ruling as "replete with" inappropriate "factual findings." At the end of the hearing, counsel urged the court to "look at the judicial notice issue" and "reiterate[d] the objections to the judicial notice[.]"

We conclude FCB preserved its claim of error. The Evidence Code does not "specify the form in which the objection must be made. . . ." (Simons, *op. cit. supra,* at § 1:20, p. 26; see also *People v. Valdez* (2012) 55 Cal.4th 82, 130 ["no 'particular form of objection' is required"].) "'What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling.'" (*People v. Abel* (2012) 53 Cal.4th 891, 924, quoting *People v. Partida* (2005) 37 Cal.4th 428, 435 (*Partida*).) Moreover, "California courts construe broadly the sufficiency of objections that preserve appellate review, focusing on whether the trial court had a

reasonable opportunity to rule on the merits of the objection before the evidence was introduced." (*Melendez v. Pliler* (9th Cir. 2002) 288 F.3d 1120, 1125.)

Here, FCB's objection informed Bank of the West of the "specific reason or reasons the objecting party believes the evidence should be excluded" (*Abel, supra*, 53 Cal.4th at p. 924) and the objection was timely in that it gave Bank of the West an opportunity to respond at the hearing on the demurrer. The objection also allowed the court to "'make a fully informed ruling[,]'" (*ibid*., quoting *Partida, supra,* 37 Cal.4th at p. 435) as demonstrated by the court's statement that it would "go back and check" that its decision to take judicial notice was correct. Although it would have been better practice for FCB to object to the requests for judicial notice in writing before the hearing (as it did when it opposed Bank of the West's demurrer to the first amended complaint), FCB's failure to file written objections to the requests for judicial notice offered in support of Bank of the West's demurer to the second amended complaint is not dispositive, particularly where Bank of the West sought judicial notice in connection with its reply brief.

Bank of the West's reliance on two cases, *Younan v. Caruso* (1996) 51 Cal.App.4th 401 (*Caruso*) and *Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556 (*Aquila*), does not alter our conclusion. In *Caruso*, the plaintiff appealed from an order dismissing his malpractice complaint against his former lawyer. (*Caruso, supra,* at p. 405.) The *Caruso* court affirmed the dismissal and — in a footnote — noted the plaintiff had moved for reconsideration of the dismissal order but did not "timely object to the propriety of judicial notice in opposition to [the] dismissal motion[.]" The *Caruso* court determined the plaintiff's failure to object in the trial court was "a waiver of that objection" on appeal. *Caruso* is distinguishable and its conclusion is dicta because the plaintiff "raised no arguments on appeal concerning" the motion for reconsideration. (*Id.* at p. 406, fn. 3.)

Aquila is not particularly helpful to Bank of the West because it illustrates one method — but not the exclusive means — of objecting to requests for judicial notice. In that case, the defendant moved to quash service of summons and the plaintiffs opposed

the motion and sought judicial notice of various documents. (*Aquila, supra,* 148 Cal.App.4th at pp. 563-564.) The defendant "formally objected that the court should not take judicial notice or receive into evidence the exhibits submitted by plaintiffs to show the alleged contacts. [The defendant] argued these exhibits were not proper matters for judicial notice for numerous reasons, such as hearsay and lack of sufficient authentication or relevance. Also, the documents could not properly be judicially noticed for the truth of their factual contents to establish sufficient minimum contacts." (*Id.* at p. 565.) Although FCB's objection was more general than the defendant in *Aquila's*, it was sufficient under section 353.

II.

Even if Exhibits 1, 2, and 9 Were Properly Judicially Noticed, They Do Not Negate the Operative Complaint's Allegations

We now turn to FCB's claim the court erred by taking judicial notice of exhibits 1, 2, and 9 and by making "factual determinations" regarding that evidence.

In reviewing an order sustaining a demurrer without leave to amend, we accept as true the complaint's properly pleaded factual allegations — "however improbable they may be" — and give them a liberal construction. (*Webb, supra,*123 Cal.App.3d at p. 604.) "In addition to the complaint's allegations, we consider matters that must or may be judicially noticed." (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400.) This rule discourages plaintiffs from filing sham pleadings: "Under the doctrine of truthful pleading, the courts 'will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed.' [Citation.]" "False allegations of fact, inconsistent with annexed documentary exhibits [citation] or contrary to facts judicially noticed [citation], may be disregarded. . . . [Citations.]'" (*Id.* at p. 400; accord, *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1102 (*Tenet Healthcare*) [allegations "contrary to the law or to a fact of which judicial notice may be taken will be treated as a nullity"]; *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117 [when ruling on a demurrer, "[a] court may take judicial

notice of something that cannot reasonably be controverted, even if it negates an express allegation of the pleading"].)

On the other hand, "'[t]he hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable.'" (*Silguero v. Creteguard, Inc.* (2010) 187 Cal.App.4th 60, 64, quoting *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374 (*Joslin*); *Webb supra,* 123 Cal.App.3d at p. 605; *Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879 ["[a] demurrer is simply not the appropriate procedure for determining the truth of disputed facts"].) Rather, "'judicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed.'" (*Joslin, supra,* 184 Cal.App.3d at p. 375, quoting *Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134 (*Cruz*); accord, *Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364-365; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1569 & fn. 9.)

We review the court's decision to take judicial notice of documents for abuse of discretion. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264; *In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1271, citing cases.) Citing *Aquila, supra,* 148 Cal.App.4th 556, Bank of the West urges us to apply a harmless error standard of review. *Aquila* — where the court reviewed a judicial notice ruling for harmless error — appears to be the minority view. We have found only one case other than *Aquila* applying the harmless error standard in a civil context: *West Valley-Mission Community College Dist. v. Concepcion* (1993) 16 Cal.App.4th 1766, 1778, where the Sixth District concluded taking judicial notice of transcripts of community college teacher's criminal trials, on judicial review of disciplinary action, constituted harmless error where the transcripts were redundant to the administrative record. We will follow the cases that review judicial notice rulings for abuse of discretion; we note, however, that we would reach the same conclusion under either standard of review.

A.

Exhibits 1 and 2

As a preliminary matter, FCB notes the difficulty ascertaining "what exactly the trial court took judicial notice of when it granted the request for judicial notice of Exhibit 1" and contends it was improper for the court to judicially notice defense counsel's declaration. We agree the court could have been more careful to note it was not taking judicial notice of defense counsel's declaration under well-established authority holding the "declaration of an adverse party is not a proper subject for judicial notice."[8] (*Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1192.) However, we do not think the court took judicial notice of defense counsel's declaration when it granted judicial notice of exhibit 1, because exhibit 1 does not appear to include defense counsel's declaration. The request for judicial notice describes exhibit 1 as Bishop's deposition testimony and specific exhibits attached to the deposition.

FCB argues the court erred by taking judicial notice of Bishop's deposition testimony in exhibits 1 and 2. Courts have articulated different standards for when a trial court may take judicial notice of deposition testimony on demurrer. At least one court has held that a court addressing a demurrer will not take judicial notice of the truth of statements contained in deposition testimony. (*Garcia v. Sterling* (1985) 176 Cal.App.3d 17, 21-22 (*Garcia*).) As the *Garcia* court explained, "[a]lthough the existence of statements contained in a deposition transcript filed as part of the court record can be judicially noticed, their truth is not subject to judicial notice." (*Id.* at p. 22.)

In *Webb*, however, the Second District held a trial court could properly "take judicial notice of records such as admissions, answers to interrogatories, affidavits, and

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[8] As stated above, the court granted Bank of the West's request for judicial notice of exhibit 1, which consisted of "[d]eposition testimony of . . . Bishop . . . and [exhibits] 3, 4, and 6 thereto as authenticated by and attached to the Declaration of Thomas McConnell in Support of . . . Bank of the West's Motion for Summary Judgment . . . a true and correct copy of which is attached . . . and incorporated herein as Exhibit 1." McConnell's declaration summarizes the deposition testimony of two witnesses, including Bishop.

the like, when considering a demurrer, only where they contain statements of the plaintiff or his agent which are inconsistent with the allegations of the pleading before the court." (*Webb, supra,* 123 Cal.App.3d at pp. 604-605 [court could "properly take judicial notice of any inconsistent statements . . . contained in . . . depositions" of the plaintiff or its representatives].) Most recently, in *Joslin*, the Fourth District explained that "[t]aking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning," and held that "'judicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed.'" (*Joslin, supra,* 184 Cal.App.3d at p. 375, quoting *Cruz, supra,* 173 Cal.App.3d at p. 1134 [facts disclosed in a deposition and not disputed could be considered in ruling on a demurrer, but facts disclosed in the deposition that were disputed could not be].)

Under *Webb*, we conclude the court erred by taking judicial notice of Bishop's deposition testimony because his testimony is not "inconsistent" with the allegations of the second amended complaint. Bishop's deposition testimony suggests two things: (1) FCB was aware of the discrepancy between the purchase price and the transfer tax before it decided to participate in the loan; and (2) FCB's decision to participate in the loan was based on its own analysis on the "data that was provided to it." This testimony is not inconsistent with the operative complaint's allegations that Bank of the West manipulated the 2006 appraisal, that Bank of the West knew the seller had "disavowed" the purchase agreement, and that Bank of the West had "serious doubt and concern" about the purchase agreement and Kobra's "integrity" as a borrower.

Even if the court properly judicially noticed Bishop's deposition testimony under *Joslin* on the theory that there was and could not be a factual dispute concerning FCB's knowledge of the existence of a transfer tax issue before FCB signed the Participation Agreement, Bishop's testimony does not negate the operative complaint's allegations that Bank of the West knew the purchase price of the property was inaccurate and manipulated the 2006 appraisal. Bishop's testimony that FCB decided to participate in the loan after conducting its own analysis does not alter our conclusion. At most,

Bishop's testimony created a factual issue about whether FCB's reliance was reasonable, given the information FCB possessed before signing the Participation Agreement — including the doctored appraisal — and given the analysis it conducted before signing the agreement. (*Williams v. Southern California Gas Co.* (2009) 176 Cal.App.4th 591, 600 [court could not infer from judicially noticed documents the defendant was unaware of defects in the wall furnace where such knowledge of the defects was "obviously a sharply contested fact"]; see also *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1058 [assuming facts stated in a declaration could be judicially noticed, "the most these averments could do is create a factual dispute as to whether respondents complied with" Civil Code section 2923.5].)

Next, FCB contends the court erred by taking judicial notice of the Credit Authorization, the Participation Agreement, and the 2007 appraisal because these documents do not "contain any statements by [FCB] which are inconsistent with the allegations of the [second amended complaint] or render [FCB']s fraud claim invalid as a matter of law." In response, Bank of the West claims the court properly judicially noticed these documents because there was no factual dispute concerning their contents and because the documents are "inconsistent with FCB's claims of justifiable reliance."

FCB does not challenge the authenticity of the Credit Authorization, Participation Agreement, or the 2007 appraisal. Nor does FCB contend there is a factual dispute regarding the contents of these documents. In *Scott v. JPMorgan Chase Bank*, N.A. (2013) 214 Cal.App.4th 743 (*Scott*), we recently held that where "judicial notice is requested of a *legally operative* document—like a contract—the court may take notice not only of the fact of the document and its recording or publication, but also facts that clearly derive from its *legal effect*. [Citation.] Moreover, whether the fact derives from the legal effect of a document or from a statement within the document, the fact may be judicially noticed where, as here, the fact is not reasonably subject to dispute." (*Id*. at p. 754.) Under *Scott*, we assume the court could take judicial notice of the existence of the credit authorization, the Participation Agreement, and the 2007 appraisal as well as the "legal effect" of those documents. But as we explain, we cannot take judicial notice —

that is declare to be indisputably true — a factual inference Bank of the West urges should be drawn from the exhibits' legal effect.

First, Bank of the West contends it is indisputable that FCB could not justifiably rely on information Bank of the West provided (or did not provide) because FCB agreed in the Participation Agreement to conduct its own investigation. We disagree. The disclaimers and due diligence contemplated by the Participation Agreement do not negate the operative complaint's allegations regarding reasonable reliance because they do not contradict the allegations that Bank of the West fraudulently manipulated an appraisal to induce FCB to participate in the loan.[9]

Bank of the West claims FCB cannot plead justifiable reliance and relies on two cases, *Bank of America v. Vannini* (1956) 140 Cal.App.2d 120 (*Vannini*) and *Bank of the West v. Valley Nat. Bank of Arizona* (9th Cir. 1994) 41 F.3d 471 (*Valley National Bank*).

Vannini involved the purchase and sale of an abandoned gold mine. The purchasers entered into an option agreement to buy the mine, but "expressly and specifically agreed to investigate the property before exercising the option by clearing water and debris out of the mine and, at their election, digging an exploratory tunnel within a specified period of time from the date of the agreement. [Citation.] The purchasers did not clear the mine and complete the investigation within the period specified in the agreement. [Citation.] Years later, after exercising the option to buy the

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[9] Moreover, the Participation Agreement does not immunize Bank of the West from losses caused by its "negligence or willful misconduct." Bank of the West claims FCB could only have relied on the 2007 appraisal as a matter of law. According to Bank of the West, "[p]ursuant to federal regulation, a bank may only make a loan secured by real estate if it first obtains a current appraisal providing an opinion of value which satisfies the standards of FIRREA[,]" also known as the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. Bank of the West continues, "[a]s such, the purchase price paid for land two years prior to the loan of August 2007 could not have been used by either bank as a basis for determination of value." To support this point, Bank of the West directs our attention to various documents, most of which the court did not judicially notice. The court did take judicial notice of California Code of Regulations, title 12, sections 722.3 and 722.4, which provide that a current appraisal is required in certain "real estate-related transactions." These regulations do not negate FCB's claim that PGP's valuation was not stated in the appraisals due to Bank of the West's fraud.

mine, the purchasers discovered the falsity of the sellers' representation that ore in commercial quantities existed in the mine. [Citation.]" (*Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1504.) The sellers sued the purchasers to recover money the purchasers allegedly owed the sellers under the option agreement; the purchasers filed an amended answer and cross-complaint predicated on the theory that the sellers had fraudulently induced them to enter into the option agreement. (*Id.* at p. 1504.) The trial court sustained the sellers' demurrer to the purchaser's amended answer and the appellate court affirmed.

The *Vannini* court determined "the real question [is] not whether [the purchasers] relied on the false representations, but whether they had the legal right to rely upon them." (*Vannini, supra,* 140 Cal.App.2d at p. 131.) The court concluded the purchasers' express agreement to conduct their own investigation "amounted to an agreement [they] were not to rely on the representations made by [the sellers], but were to rely on their own investigation." (*Id.* at p. 131.) The court then held, "[a]s a matter of law," "the alleged misrepresentations were not intended, nor could not have been intended, by [the sellers] to induce [the purchasers] to exercise their option. It must also be held, as a matter of law, that [the purchasers] had no legal right to rely on the false representations at the time that they exercised the option," and thus the trial court had properly sustained the demurrer to the purchasers' amended answer. (*Id.* at p. 132.) According to the *Vannini* court, if the purchasers had performed their contractual duty to clear the mine and investigate the property, "they would have gained full knowledge of the falsity of the representations made to induce the contract." (*Ibid.*)

The *Vannini* court, however, suggested the purchasers would have a fraud claim if they incurred damages after entering into the purchase agreement and before they failed to conduct their investigation. As the court explained, the purchasers' amended answer alleged the sellers "made the false representations as to the existence of the ore in commercial quantities with intent to induce [the purchasers] to enter into the contract, and [the purchasers] had a right to rely on them. At this point, however, [the purchasers] had not been damaged because they had paid nothing for the option. They were supposed to

make an investigation in the next 17 months. Clearly, the facts above stated, would have supported a cause of action for expenses incurred in that investigation." (*Vannini, supra,* 140 Cal.App.2d at p. 132.)

This language from *Vannini* suggests the purchasers would have been entitled to rely on false representations made by the sellers to induce them to enter into the option agreement. The same is true here. Paragraph 7.1 — where FCB *acknowledged* it entered into the Participation Agreement "in reliance upon its own independent investigation of [Kobra's] financial condition and creditworthiness" and *acknowledged* it would "independently and without reliance on [Bank of the West] . . . continue to make its own credit decisions in connection with the Loan and [the Participation] Agreement" — does not alter our conclusion. The due diligence contemplated by paragraph 7.1 of the Participation Agreement pertained to Kobra's creditworthiness, not to the genuineness of the appraisal allegedly manipulated by Bank of the West.

In *Valley National Bank,* Bank of the West and Valley National Bank (Valley National) entered into a loan participation agreement with provisions similar to the ones at issue here. For example, under paragraph 5 of the agreement, "the parties agreed that Valley National made its own decision on Technical Equities' creditworthiness, without relying on Bank of the West, and would continue to do so. [Citation.] Bank of the West was not to be responsible for errors or omissions regarding Technical Equities' creditworthiness 'except for [its] own gross negligence, bad faith, or willful misconduct.' [Citation.]" (*Valley National Bank, supra,* 41 F.3d at p. 474.) Technical Equities filed for bankruptcy and Bank of the West sued Valley National to recover "'extraordinary expenses'" pursuant to the loan participation agreement. (*Id.* at p. 476.)

Valley National "counterclaimed for fraud based on Bank of the West's concealment of the Anderson and Robbins reports[,]" two "devastating reports about Technical Equities" prepared by employees of Bank of the West and its parent company. (*Valley National, supra,* 41 F.3d at p. 476.) The district court granted summary judgment in favor of Bank of the West on liability for the extraordinary expenses claim, but let the reasonableness of the amount of expenses, and the fraud counterclaim, go to trial. . . .

Valley National won a jury verdict on its fraud counterclaim, for $2 million compensatory and $4 million in punitive damages. The district court granted judgment in favor of Bank of the West notwithstanding the verdict and "set aside the fraud verdict" because it found, among other things, that "Valley National was contractually obligated to make its own independent assessment of Technical Equities' creditworthiness, so could not have justifiably relied on Bank of the West. . . ." (*Id.* at pp. 476-477.)

The Ninth Circuit Court of Appeals affirmed the district court's grant of judgment notwithstanding the verdict in favor of Bank of the West, concluding "[t]he justifiable reliance element for fraud was entirely absent." (*Valley National Bank, supra,* 41 F.3d at p. 477.) The court rejected Valley National's claim that "regardless of the contractual terms, it did, in fact, rely on Bank of the West for important information concerning the borrower." (*Ibid.*) The court held it was not reasonable for Valley National to rely on representations made by Bank of the West when the parties agreed in writing "that Valley National would make its own judgment about Technical Equities' creditworthiness, without reliance on Bank of the West" and where Valley National agreed to make its own decisions "'[i]ndependently and without reliance upon'" Bank of the West. (*Id.* at pp. 477-478.) As the *Valley National Bank* court explained, the parties "expressly agreed to a relationship in which each would investigate independently and exercise independent judgment[, and] [t]here was no lack of clarity in the contract, no mutual mistake, no reason to suppose that the parties mutually intended any relationship other than what the contract said." (*Id.* at p. 477.)

The *Valley National Bank* court continued, "[t]o the extent that any reliance might have been justifiable during the period when Bank of the West arguably hid negative information, . . .Valley National proved no conduct in justifiable reliance, and no damages. Neither bank loaned any money to Technical Equities after February. Valley National did not advance any money to Bank of the West during the period when information was hidden." (*Valley National Bank, supra,* 41 F.3d at p. 478.)

Valley National Bank is distinguishable. In that case, Valley National was not fraudulently induced to enter the loan participation agreement and was not damaged by

Bank of the West's nondisclosure of the Anderson and Robbins reports. Here, FCB has alleged Bank of the West fraudulently induced it into entering the Participation Agreement by manipulating the appraisal; FCB has also alleged it acted in justifiable reliance and suffered damages.

Next, Bank of the West claims FCB's reliance was unreasonable because the Credit Authorization and the 2007 appraisal disclosed the transfer tax issue and Kobra's cash flow problems. This misapprehends FCB's charging allegations. The second amended complaint alleges Bank of the West manipulated the 2006 appraisal to convince FCB that the property had sufficient value notwithstanding the discrepancy. In addition, we conclude the contents of the Credit Authorization, the Participation Agreement, and the 2007 appraisal do not defeat FCB's fraud claim as a matter of law. (See *Tenet, supra*, 169 Cal.App.4th at pp. 1103-1104 [judicially noticed medical center's annual licenses did "not conclusively negate" the operative complaint's allegations; "the judicial notice order . . . does not permit the demurrer to be sustained"].) The documents merely establish FCB had an awareness of the transfer tax issue and Kobra's financial condition; they do not establish indisputably that FCB could not (and did not) reasonably rely on Bank of the West's fraudulent manipulation of the 2006 appraisal.

"'Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact.'" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.) We do not think this is that "rare case where the undisputed facts leave no room for a reasonable difference of opinion[.]" (*Id.* at p. 1239; see also *Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 190-191 [reasonableness of the plaintiff's reliance was a question of fact].) The reasonableness of FCB's reliance is a question of fact that cannot be resolved on demurrer.

B.

Exhibit 9

Finally, FCB contends the court erred by taking judicial notice of exhibit 9 because "[a] memorandum of points and authorities by a party is not properly the subject of judicial notice; it is argument and not fact." FCB also argues that to the extent Hess's declaration "cites evidence, it consists of testimony by [FCB's] own employees which is. . . an entirely inappropriate use of judicial notice." In response — and without citing to the record — Bank of the West claims it made it clear in its reply brief in the trial court that "the subject of judicial notice was the 2006 Appraisal." Although we think neither the request for judicial notice of exhibit 9 nor Bank of the West's reply brief in the trial court necessarily make it clear that Bank of the West sought judicial notice of *solely* the 2006 appraisal in exhibit 9, we take the Bank's argument on appeal as a concession that it would have been improper for the court to take judicial notice of FCB's motion to file a first amended complaint and supporting declaration. We therefore analyze whether the court abused its discretion by taking judicial notice of the 2006 appraisal.

According to Bank of the West, the court properly judicially noticed the fact that the computation of the property value in the 2006 appraisal was not the product of manipulation but rather a "typographical error." Based on the rules articulated above, we assume the court could take judicial notice of the 2006 appraisal and the legal effect of that document. (*Scott, supra,* 214 Cal.App.4th at pp. 754-755.) While we assume the court could take judicial notice of the 2006 appraisal and its contents, we are unwilling to draw a factual inference regarding the import of the calculations in the appraisal where the complaint alleges there was no typographical error and that PGP changed the property valuation at Bank of the West's insistence. At best, there is a factual dispute here precluding the sustaining of Bank of the West's demurrer.

III.

Conclusion

We assume for the sake of argument the court did not err by taking judicial notice of exhibits 1, 2, and 9. The court, however, erred by concluding — based on these

documents — that FCB could not, as a matter of law, show its reliance on Bank of the West's acts or omissions was reasonable. Assuming — as we must — the truth of the operative complaint's allegations, the issue of the reasonableness of FCB's reliance "cannot be resolved at this stage of the litigation." (*Skov v. U.S. Bank National Assn.* (2012) 207 Cal.App.4th 690, 697.) "Accordingly, and because it was inappropriate at that stage of the proceedings to resolve the factual issue involved, it was error for the trial court to sustain [Bank of the West's] demurrer." (*Cruz, supra,* 173 Cal.App.3d at p. 1134, fn. omitted.) Having reached this result, we need not address FCB's final claim that the court erred by staying discovery pending the resolution of Bank of the West's demurrer to the second amended complaint.

DISPOSITION

The judgment is reversed with directions to the superior court to vacate its order sustaining the demurrer without leave to amend and to enter a new order overruling the demurrer. FCB is entitled to recover its costs on appeal.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.